

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Michelle Letellier

v.

Civil No. 13-cv-271-PB
Opinion No. 2014 DNH 052

Commissioner of Social Security
Administration

MEMORANDUM AND ORDER

Michelle Letellier seeks judicial review of a ruling by the Commissioner of the Social Security Administration ("SSA") denying her application for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB"). Letellier claims that the Administrative Law Judge ("ALJ") lacked substantial evidence to support his finding that she was not disabled. Letellier also claims that the ALJ failed to adequately consider and appropriately weigh the opinions of medical sources when making his residual functional capacity ("RFC") assessment.

For the reasons set forth below, I reverse the decision of the Commissioner and remand for further administrative proceedings.

I. BACKGROUND¹

A. Procedural History

Letellier applied for SSI and DIB on December 8, 2010, claiming that she became disabled due to a back injury on November 13, 2010. Tr. at 183, 190. The SSA denied Letellier's claims on April 27, 2011. Tr. at 88, 91. Letellier requested a hearing before an ALJ, which was held on May 7, 2012. She was represented by an attorney at the hearing, at which a vocational expert ("VE") testified. Letellier presented new evidence at the hearing regarding several impairments in addition to her back injury. On May 25, 2012, the ALJ issued a decision finding Letellier not disabled on or after her alleged disability onset date. The Appeals Council denied Letellier's request for review on April 29, 2013. Accordingly, the ALJ's decision is the final decision of the Commissioner.

B. Relevant Medical History²

Several health care providers who treated Letellier for her physical ailments between 2007 and 2012 made note of her mental

¹ The background facts are presented in the parties' Joint Statement of Material Facts (Doc. No. 12) and are summarized here. I also rely on the Administrative Transcript (Doc. No. 6), citations to which are indicated by "Tr.".

² Because the ALJ's treatment of Letellier's alleged mental impairments requires remand, I need not discuss her various physical impairments.

state during examinations. During numerous visits to Coos County Family Health Services during this period, Letellier complained of depression, anxiety, and panic attacks. Tr. at 436-521, 526-52, 996-1006. Nevertheless, examination notes indicate that she possessed intact judgment, insight, and memory, was oriented to time, place, and person, and showed no signs of depression or anxiety. In 2009 and 2010, Letellier's doctors at the Central Maine Pulmonary and Sleep Medicine facility reported that she was consistently alert and cooperative with normal mood, affect, attention span, and concentration. On November 29, 2010, Dr. Tiffany Pineda, M.D., noted that an examination of Letellier revealed intact memory and normal attention and concentration. Letellier's physical therapist noted that her affect was flat on May 19, 2011.

Dr. Cheryl Bildner, Ph.D., examined Letellier on March 2, 2011. Tr. at 373-77. Letellier reported a history of depression and anxiety, but Dr. Bildner noted that Letellier was not receiving treatment and had never been hospitalized for a psychiatric condition. Dr. Bildner nevertheless diagnosed Letellier with depressive disorder (not otherwise specified) and ruled out undifferentiated somatoform disorder.³ Upon

³ Unspecified depressive disorder involves "the presence of sad,

examination, Dr. Bildner reported that Letellier was alert, oriented to person, place, time, and situation, and presented an appropriate affect, intact thought process, and a fund of knowledge and intelligence in the average range. In contrast, Letellier exhibited a depressed mood, low energy and motivation, and variable attention, concentration, distractibility, and insight. Letellier could follow simple directions but became tangential on several occasions and made errors on the Mini Mental State Examination ("MMSE").⁴ Dr. Bildner noted that Letellier was working as a personal care assistant for seven hours a week and was able to perform most activities of daily living, although some of these activities were limited or modified. In particular, Letellier showered daily, took her own medications, drove, shopped, managed personal affairs, did

empty, or irritable mood." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 309-10 (5th ed. 2013) [hereinafter DSM-V]. Undifferentiated somatoform disorder, now known as unspecified somatic symptom and related disorder, involves "the prominence of somatic symptoms" that "initial[ly] present[] mainly in medical rather than mental health care settings." Id. at 155. Both disorders "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning" Id. at 184, 327.

⁴ The MMSE is "a screening test for global cognitive dysfunction [that] taps frontal, spatial, and memory domains of cognitive function. It identifies subjects with a high probability of moderate to severe global cognitive impairment." Robert J. Campbell, Campbell's Psychiatric Dictionary 616 (9th ed. 2009).

laundry, and prepared meals. Dr. Bildner concluded that Letellier was able to interact appropriately with others, communicate effectively, understand and remember locations and work-like procedures, understand basic instructions, and make simple decisions. She determined that Letellier was unable to sustain attention and concentration for extended periods of time due to fatigue and distractibility, had poor motivation which interfered with task completion, had a delayed pace of completion, was unable to tolerate stress associated with a workplace, and was unable to maintain a full-time established schedule.

On March 8, 2011, Dr. Laura Landerman, Ph.D., conducted a review of Letellier's complete medical record. Tr. at 378-94. Dr. Landerman noted that Letellier's statements were credible and gave great weight to some of Dr. Bildner's findings, including her diagnosis of a depressive disorder. Dr. Landerman found that Letellier had not experienced any episodes of decompensation of extended duration. She determined that Letellier was mildly limited in her social functioning and activities of daily living, but moderately limited in her ability to maintain concentration, persistence, or pace, to understand, to remember, and to adapt. Dr. Landerman found that

Letellier was able to remember locations and work-like procedures, make simple work-related decisions, function effectively without special supervision, maintain a schedule and appropriate attendance, sustain attention and concentration for two-hour periods, persist to task and pace within a normal eight-hour workday and forty-hour workweek without an undue number of interruptions from psychological symptoms, and accommodate to simple and routine changes in the workplace. She concluded that Letellier could interact with co-workers, but would fare better with a gentle, supportive, non-confrontational supervisor, and that she could understand, recall, and carry out short and simple instructions, but would be "unable to consistently do so with more complex and detailed ones." Tr. at 394.

After Drs. Bildner and Landerman had completed their assessments, Letellier began attending periodic therapy sessions with Janice MacKenzie, a licensed clinical social worker. Tr. at 425-35. On November 15, 2011, Ms. MacKenzie completed a medical source statement based on her observations of Letellier over the previous five months. Id. She diagnosed Letellier with recurrent, moderate major depressive disorder in addition to anxiety disorder (not otherwise specified) with posttraumatic

traits.⁵ Ms. MacKenzie assessed Letellier's global level of functioning as indicative of "flat affect and circumstantial speech[with] occasional panic attacks[, or] moderate difficulty in social[or] occupational . . . functioning (e.g., few friends[and] conflicts with peers or co-workers)."⁶ A mental status examination revealed that Letellier possessed intact memory, rational and organized thought process and content, sad or depressed mood, appropriate affect, and good insight, orientation, and judgment. Ms. MacKenzie concluded that Letellier was markedly limited in her ability to understand, remember, and carry out detailed instructions, to maintain

⁵ Unspecified anxiety disorder involves "excessive fear and anxiety and related behavioral disturbances" that cause "clinically significant distress or impairment in social, occupational, or other important areas of functioning" DSM-V, supra note 3, at 189, 233. Posttraumatic traits may include "[d]evelopmental regression," "[a]uditory pseudo-hallucinations," "paranoid ideation," "difficulties in regulating emotions or maintaining stable interpersonal relationships," and "dissociative symptoms." Id. at 276.

⁶ This is the narrative description of Letellier's Global Assessment of Functioning ("GAF") score, which Ms. MacKenzie assessed as fifty-six. See Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed. text rev. 2000). The SSA has remarked that the GAF Scale "does not have a direct correlation to the severity requirements in our mental disorders listings," Revised Medical Criteria for Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg. 50,746, 50,764-65 (Aug. 21, 2000), and the American Psychiatric Association no longer recommends use of the GAF Scale due to "its conceptual lack of clarity . . . and questionable psychometrics in routine practice." DSM-V, supra note 3, at 16.

attention and concentration sufficient to perform work tasks throughout an eight-hour workday, to complete a normal workday and workweek without interruptions from psychologically based symptoms, and to perform at a consistent pace without an unreasonable number and length of rest periods.

C. Administrative Hearing – May 7, 2012⁷

1. Letellier's Testimony

In addition to her testimony regarding various physical impairments, Letellier testified that she experienced anxiety and stress. She noted that she had never been hospitalized for a psychological condition, but she participated in therapy once a week, took medication for anxiety, and had been prescribed Klonopin⁸ for panic attacks. She reported that she had

⁷ Letellier's motion to reverse, a letter from Letellier's attorney to the Appeals Council, and an amended notice of hearing from the Commissioner all mention St. Johnsbury, Vermont as the hearing location. [Doc. No. 8](#); Tr. at 6, 163. If true, this would raise the question whether the ALJ applied the relevant law as it has been interpreted in the Second Circuit. His decision cites no cases to clarify the matter. The hearing transcript lists the location as Manchester, New Hampshire, however, and both Letellier and the Commissioner primarily rely on First Circuit cases to support their arguments. [Doc. Nos. 8, 11-1, 13](#); Tr. at 26-28. I therefore assume that the ALJ applied the law as interpreted in the First Circuit and I review his decision accordingly.

⁸ Klonopin is used "as an antipanic agent in the treatment of panic disorders." [Dorland's Illustrated Medical Dictionary](#) 379, 1003 (31st ed. 2007).

difficulty shopping for groceries and cleaning the shower but was able to perform light housekeeping, vacuum, cook, work part-time, and babysit her nephews on occasion.

2. Vocational Expert Testimony

The ALJ first asked the VE to assume a person who could perform light work with the following additional limitations: understanding, remembering, and carrying out moderately complex four-to-five step instructions, making simple work-related decisions, adapting to routine workplace changes, maintaining focus for a two-hour period, working routinely with the public but not in an intense manner on a sustained basis, occasionally performing postural activities, but never climbing ladders, ropes, or scaffolds. The VE testified that a person with these limitations could perform Letellier's past work as a personal care attendant and sales clerk. When asked whether any unskilled jobs exist for an individual with the above limitations and Letellier's age, education, and work experience, the VE testified that such a person could work as a bench worker, inserter/packer, and mail clerk. When the ALJ added that the individual would not be able to perform activities requiring repetitive reaching or fine manipulation, the VE testified that such a person could work as a mail clerk, charge-

account clerk, and order clerk. The VE noted the number of positions existing in the regional and national economies for all of the aforementioned positions.

D. The ALJ's Decision

In his decision dated May 25, 2012, the ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R. §§ 404.1520(a)(4) and 416.920(a)(4) to determine whether an individual is disabled. At step one, the ALJ noted that Letellier had worked part-time as a personal care attendant during the alleged disability period, but he concluded that this work did not generate earnings sufficient to rise to the level of substantial gainful activity. At step two, the ALJ found that Letellier had the following severe impairments: fibromyalgia, sciatica, sleep apnea, depression, and anxiety. At step three, the ALJ found that Letellier did not have an impairment or combination of impairments that met or medically equaled the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. The ALJ then found that Letellier retained the Residual Functional Capacity ("RFC") to perform light work per 20 C.F.R. §§ 404.1567(b) and 416.967(b), subject to a number of specific limitations including the following:

[Letellier] . . . can understand, remember and carry out moderately complex 4-5 step instructions, can make

simple work related decisions, can adapt to routine changes in the work environment, can maintain focus for 2 hours at a time and she can interact with the public in routine matters, but not in intense matters on a sustained basis.

Tr. at 17. The ALJ followed a two-step analysis to develop Letellier's RFC. First, he considered whether she suffered from any medically determinable impairment. He concluded that she did, and that her impairments could reasonably be expected to cause her alleged symptoms. Second, he determined the extent to which the intensity and persistence of Letellier's symptoms limited her functioning. The ALJ found Letellier's testimony regarding "the intensity, persistence and limiting effects of [her] symptoms . . . not credible to the extent [it was] inconsistent with" his RFC determination. Id.

The ALJ provided several reasons for concluding that Letellier was not credible. With respect to her mental impairments, the ALJ explained that "objective mental status examination documents depressed mood, but organized and goal directed speech with normal rate and volume, appropriate affect, intact thought process and orientation x3.^[9] Attention and concentration were variable and she exhibited low motivation, but she could follow simple directions." Tr. at 18. The ALJ

⁹ "Orientation x3" denotes "awareness of one's environment with reference to place, time, and people." Id. at 1356.

also emphasized that Letellier's activities of daily living were consistent with his RFC determination. Tr. at 19. He found Dr. Landerman's opinion to be deserving of significant weight because it is "well-supported and consistent with [Letellier's] presentation at the hearing," but he gave little weight to Ms. MacKenzie's determination that Letellier was markedly limited in her ability to manage detailed instructions because that conclusion "is not well supported by the objective finding of this treating source's own mental status examination, which found [Letellier's] memory to be intact and her thought process to be rational and organized." Id.

Based on his RFC determination and the VE's testimony, the ALJ found at step four that Letellier was capable of performing her past relevant work as a personal care attendant and sales clerk. He did not make an alternative step five finding. Accordingly, the ALJ concluded that Letellier was not disabled from her alleged onset date through the date of his decision.

II. STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), I must review the pleadings and the administrative record and enter a judgment affirming, modifying, or reversing the final decision of the Commissioner.

My review "is limited to determining whether the ALJ used the proper legal standards and found facts [based] upon the proper quantum of evidence." [Ward v. Comm'r of Soc. Sec.](#), 211 F.3d 652, 655 (1st Cir. 2000).

The ALJ is responsible for determining issues of credibility and for drawing inferences from evidence in the record. [Irlanda Ortiz v. Sec'y of Health & Human Servs.](#), 955 F.2d 765, 769 (1st Cir. 1991) (per curiam) (citing [Rodriguez v. Sec'y of Health & Human Servs.](#), 647 F.2d 218, 222 (1st Cir. 1981)). It is the role of the ALJ, not the court, to resolve conflicts in the evidence. Id. The ALJ's findings of fact are accorded deference as long as they are supported by substantial evidence. Id. Substantial evidence to support factual findings exists "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion." Id. (quoting [Rodriguez](#), 647 F.2d at 222). If the substantial evidence standard is met, factual findings are conclusive even if the record "arguably could support a different conclusion." Id. at 770 (citing [Rodriguez Pagan v. Sec'y of Health & Human Servs.](#), 819 F.2d 1, 3 (1st Cir. 1987) (per curiam)).

Findings are not conclusive, however, if they are derived by “ignoring evidence, misapplying the law, or judging matters entrusted to experts.” [Nguyen v. Chater](#), 172 F.3d 31, 35 (1st Cir. 1999) (per curiam) (citing [Irlanda Ortiz](#), 955 F.2d at 769; [Da Rosa v. Sec’y of Health & Human Servs.](#), 803 F.2d 24, 26 (1st Cir. 1986) (per curiam)).

III. ANALYSIS

Letellier moves for reversal and remand on three main grounds. She argues that the ALJ (1) crafted a mental RFC that was less limiting than the unanimous assessment of the sources of record; (2) failed to state and explain the weight he gave to Dr. Bildner’s medical opinion; and (3) failed to adequately weigh and evaluate the opinions of the remaining sources. According to Letellier, each error independently produced an erroneous RFC determination, rendering the ALJ’s conclusion unsupported by substantial evidence.

I find that Letellier’s first argument has merit. Consequently, I do not address her remaining arguments.

A. The ALJ’s Mental RFC Determination is not Supported by Substantial Evidence

Letellier argues that the ALJ’s RFC determination, which states that she can “understand, remember and carry out

moderately complex 4-5 step instructions," is inconsistent with every medical opinion of record. Specifically, every opinion discussing Letellier's mental functioning includes a statement to the effect that she can only follow simple instructions on a sustained basis. See Tr. at 374 (Dr. Bildner's opinion that Letellier "could follow simple directions"), Tr. at 394 (Dr. Landerman's opinion that Letellier could "carry out short and simple instructions" but could not "consistently do so with more complex and detailed ones"), Tr. at 434 (Ms. MacKenzie's opinion that Letellier could "carry out very short and simple instructions" on a sustained basis, but not detailed ones).¹⁰

Lettelier argues that the ALJ erred by disregarding uncontroverted medical opinions in favor of his own lay opinion on the matter. See, e.g., Nguyen, 172 F.3d at 35; Rosado v. Sec'y of Health & Human Servs., 807 F.2d 292, 294 (1st Cir. 1986) (per curiam). She reasons that the ALJ's hypothetical question incorporating the "moderately complex instructions" language was inaccurate, that the VE's testimony based on that hypothetical was unreliable, and that the ALJ's conclusion that

¹⁰ As the Commissioner notes, Ms. MacKenzie is not an acceptable medical source. See 20 C.F.R. § 404.1513(a); 416.913(a). Nevertheless, her opinion on this point, which is based on her treatment relationship with Letellier, provides additional support for the opinions of Drs. Bildner and Landerman, who are acceptable medical sources.

she is not disabled because she can perform her past relevant work is consequently not supported by substantial evidence. See Arocho v. Sec'y of Health & Human Servs., 670 F.2d 374, 375 (1st Cir. 1982) ("[I]n order for a vocational expert's answer to a hypothetical question to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities.").

As the Commissioner has not disputed Letellier's contention that the ALJ's RFC determination was erroneous, I could simply accept that Letellier is correct and proceed to address the Commissioner's assertion that any such error was harmless. Because it may provide some guidance to the ALJ on remand, however, I examine the process by which his RFC was determined.

The ALJ offered the following explanation for his conclusion that Letellier could follow "moderately complex 4-5 step instructions" on a sustained basis:

The medical source statement of treating therapist Janice Mackensie [sic] for marked limitation of the claimant's ability to handle detailed instruction is given only little weight and is given only some consideration in the limitations of the residual functional capacity because it is not well supported by the objective finding of this treating source's own mental status examination, which found the claimant's memory to be intact and her thought process to be rational and organized.

Tr. at 19. There are two problems with this explanation.

First, although Ms. MacKenzie is not an acceptable medical source capable of providing a medical opinion to establish the existence of an impairment, see 20 C.F.R. §§ 404.1513(a); 416.913(a); SSR 06-03P, 2006 WL 2329939, at *2 (Aug. 9, 2006), she is a medical source capable of making objective medical findings and translating those findings into specific functional limitations. See 20 C.F.R. §§ 404.1513(d)(1); 416.913(d)(1); cf. Alcantara v. Astrue, 257 F. App'x 333, 335 (1st Cir. 2007) (per curiam); Couitt v. Astrue, 2012 DNH 066, 13-16. The ALJ, on the other hand, is not. See Nguyen, 172 F.3d at 35 ("As a lay person . . . the ALJ [i]s simply not qualified to interpret raw medical data in functional terms"). The ALJ's translation of Ms. MacKenzie's objective findings (that Letellier possessed an intact memory and a rational and organized thought process) into a specific functional limitation (the ability to manage moderately complex four to five step instructions) was impermissible, as it was contrary to Ms. MacKenzie's own conclusions on the matter.

To be sure, the ALJ would have been warranted in rejecting Ms. MacKenzie's conclusions if there was substantial evidence in the record - typically in the form of a conflicting opinion from

another medical source - to the contrary.¹¹ But every other medical source agreed with Ms. MacKenzie's opinion and the ALJ provided no additional evidence to support his own conclusion.¹²

See id.; Gonzalez Maldonado v. Sec'y of Health & Human Servs., 996 F.2d 1209 (1st Cir. 1993) (per curiam) (unpublished table decision). The ALJ therefore had no substantial evidence upon which to base his conflicting RFC determination that Letellier "can understand, remember and carry out moderately complex 4-5 step instructions."

B. The ALJ's Error was not Harmless

The ALJ's error in crafting his RFC was not harmless. As an initial matter, it rendered his step four finding - that

¹¹ Indeed, the ALJ could have considered and rejected Ms. MacKenzie's conclusions without providing any explanation for doing so if there was other substantial evidence in the record upon which he could rely. See 20 C.F.R. §§ 404.1527; 416.927; SSR 06-03P, 2006 WL 2329939, at *2, 5. In this case, there was not.

¹² Notably, the ALJ ultimately rejected the functional limitation proposed by all three medical sources despite appearing to agree with it elsewhere in his decision. For instance, the ALJ stated that Dr. Landerman's opinion, which notes that Letellier could "carry out short and simple instructions" but could not "consistently do so with more complex and detailed ones," see Tr. at 394, was "well-supported and consistent with the claimant [sic] presentation at the hearing and deserving of significant weight." Tr. at 19. The ALJ also quoted Dr. Bildner's statements that Letellier could "understand basic instructions" and "follow simple directions," see Tr. at 374, 376, with apparent approval in support of his step three and step four findings. See Tr. at 16, 18.

Letellier could perform her past relevant work - unsupported by substantial evidence. At the hearing, the ALJ advised the VE that he was required to note any conflicts between his testimony and the Dictionary of Occupational Titles ("DOT"), see Tr. at 68, and the VE never noted a deviation. Based on the VE's testimony - which was in turn based on the erroneous RFC - the ALJ determined that Letellier could perform her past relevant work as a personal care attendant, see DOT 309.677-010, and sales clerk, see DOT 211.462-014. The DOT states that both positions require a General Educational Development ("GED") Reasoning Level of three, meaning that each position requires a worker to "[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form," as well as a Specific Vocational Preparation ("SVP") Level of three, meaning that each position is generally considered semi-skilled. See SSR 00-4P, 2000 WL 1898704, at *3 (Dec. 4, 2000). Both of these criteria exclude workers who can only follow simple instructions from working in either position as it is generally performed.¹³ See, e.g., King v. Comm'r of Soc. Sec.,

¹³ The ALJ found that Letellier could work as a personal care attendant and sales clerk both as those positions are generally performed and as they were actually performed by Letellier. Tr. at 19. He did not find that the positions as actually performed differed in any way from their DOT descriptions.

No. 1:12-CV-1686 GLS, 2013 WL 5567112, at *3 (N.D.N.Y. Oct. 9, 2013); Mead v. Barnhart, 2004 DNH 161, 4-5. The conclusion that Letellier was not disabled because she could perform her past relevant work was therefore erroneous.

Nevertheless, the Commissioner claims that any error at step four was harmless because the VE also identified unskilled jobs existing in significant numbers in the national and regional economies that Letellier can perform. See 20 C.F.R. §§ 404.1568; 416.968; SSR 00-4P, 2000 WL 1898704, at *3 (correlating DOT job descriptions to skilled, semi-skilled, and unskilled work); see also Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001) (noting that the Commissioner "has the burden at Step 5 of coming forward with evidence of specific jobs in the national economy that the applicant can still perform"). The Commissioner claims that these unskilled jobs can be performed by an individual who can only follow simple instructions. See Polanco-Quinones v. Astrue, 477 F. App'x 745, 746 (1st Cir. 2012) (per curiam) ("[T]he basic mental demands of unskilled work [include] 'the abilit[y] (on a sustained basis) to understand, carry out, and remember simple instructions'" (quoting SSR 85-15, 1985 WL 56857, at *4 (Jan. 1, 1985))); see also Tr. at 85 (Disability Determination Service opinion

that Letellier is “capable of unskilled work” but “unable to perform [her] past type of work”). In the Commissioner’s view, the ALJ would have reached the same conclusion had he crafted an accurate RFC and proceeded to step five of the sequential evaluation process.

Letellier responds that a reviewing court may not apply the harmless error doctrine to affirm an ALJ’s decision on a ground other than that relied on by the ALJ. See, e.g., Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). As a general rule, that is correct. But an exception exists when any reasonable ALJ applying the correct standard would have necessarily reached the same conclusion. Ward, 211 F.3d at 656 (remand is not necessary if it would “amount to no more than an empty exercise” because “application of the correct legal standard could lead to only one conclusion” (quoting Schaal v. Apfel, 134 F.3d 496, 504 (2d Cir. 1998))); accord Fischer-Ross v. Barnhart, 431 F.3d 729, 733-34 (10th Cir. 2005) (although harmless error analysis must be used cautiously in the administrative setting, it is appropriate “where, based on material the ALJ did at least consider (just not properly), we could confidently say that no reasonable administrative factfinder, following the correct

analysis, could have resolved the factual matter in any other way” (quoting [Allen v. Barnhart](#), 357 F.3d 1140, 1145 (10th Cir. 2004))). Nonetheless, it is a bridge too far to employ the harmless error doctrine to affirm an ALJ’s decision on grounds that were likely considered by the ALJ, but were not expressly discussed in the decision. Such speculation would permit a reviewing court to play factfinder, but that is a function delegated exclusively to the administrative agency. See, e.g., Chenery, 332 U.S. at 196.

The parties have not cited, and I am not aware of, any case in which a reviewing court affirmed an ALJ’s decision on the basis of a hypothetical administrative finding that the ALJ did not expressly make in his or her decision. Numerous courts have refused the Commissioner’s invitation to do just that. See, e.g., Andry v. Colvin, No. 2:12-CV-00746-KJN, 2013 WL 5305903, at *8 (E.D. Cal. Sept. 19, 2013); Mann v. Comm’r of Soc. Sec., No. 6:12-CV-1276-ORL-GJK, 2013 WL 4734822, at *3 (M.D. Fla. Sept. 3, 2013); Shortridge v. Astrue, No. 1:11-CV-71-MP-GRJ, 2012 WL 1598012, at *7 (N.D. Fla. Apr. 3, 2012), rep. & rec. adopted, 2012 WL 1597518 (N.D. Fla. May 7, 2012); Cabreja v. Astrue, No. 11-130-ML, 2012 WL 272746, at *6 (D.R.I. Jan. 27, 2012); Smith v. Astrue, No. C11-5386-JCC-BAT, 2012 WL 440826, at

*3 (W.D. Wash. Jan. 11, 2012), rep. & rec. adopted, 2012 WL 439419 (W.D. Wash. Feb. 10, 2012); Burton v. Astrue, No. 11-1776-SP, 2012 WL 12742, at *4 (C.D. Cal. Jan. 3, 2012); Chiasson v. Astrue, 2010 DNH 211, 16-18; Vining v. Astrue, 720 F. Supp. 2d 126, 128 (D. Me. 2010); Holt v. Astrue, No. 08-2410-KHV, 2009 WL 3807082, at *8-9 (D. Kan. Nov. 12, 2009); cf. Brun v. Barnhart, 126 F. App'x 495 (1st Cir. 2005) (per curiam) (unpublished table decision) (citing SEC v. Chenery Corp., 318 U.S. 80 (1943)) (appropriate to apply the harmless error doctrine to affirm on an alternative ground that the ALJ expressly considered in the decision); Guranovich v. Astrue, 465 F. App'x 541, 543 (7th Cir. 2012) (per curiam) (same); Mason v. Astrue, 2013 DNH 013, 15-16 (same). In all of the harmless error cases cited by the Commissioner, the reviewing court identified express findings in the ALJ's decision that were untainted by the error and independently sufficient to support the ALJ's ultimate decision. See Hines v. Astrue, No. 11-CV-184-PB, 2012 WL 1394396, at *6 (D.N.H. Mar. 26, 2012), rep. & rec. adopted sub nom. Hines v. U.S. Soc. Sec. Comm'r, 2012 WL 1393063 (D.N.H. Apr. 20, 2012); Norwood v. Astrue, No. CV-09-3996-RC, 2010 WL 2509358, at *3 (C.D. Cal. June 17, 2010);

Mitchell v. Astrue, No. CA-07-229 ML, 2009 WL 50171, at *12 (D.R.I. Jan. 7, 2009). Hence, those cases are inapposite.

If the ALJ had made an alternative, on-the-record step five finding, harmless error analysis would clearly be appropriate. But he did not, and it is not my role to do so for him. See, e.g., Holt, 2009 WL 3807082, at *9 (“[T]he court may not accept counsel’s post hoc rationalization and affirm the decision on a basis other than that presented in the Commissioner’s decision.”).

IV. CONCLUSION

For the foregoing reasons, I deny the Commissioner’s motion to affirm (Doc. No. 11) and grant Letellier’s motion to reverse or remand (Doc. No. 8). Pursuant to sentence four of 42 U.S.C. § 405(g), I remand the case to the Social Security Administration for further proceedings consistent with this decision.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

March 11, 2014

cc: Tamara N. Gallagher, Esq.
Karen B. Fitzmaurice, Esq.
T. David Plourde, Esq.